United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original

75-7338

To be argued by
STANLEY L. KANTOR

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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LESLIE CANTY, JR.,

Plaintiff-Appellant,

-against-

ELMER FLEMING, New York City Police Department, Narcotic Addiction Control Commission, STANLEY A. SLAWINSKI, Director, and the STATE OF NEW YORK,

Defendants-Appellees.

----------X

BRIEF FOR DEFENDANTS-APPELLEES SLAWINSKI, THE NEW YORK STATE NARCOTIC ADDICTION CONTROL COMMISSION, AND NEW YORK STATE.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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LESLIE CANTY, JR.,

Plaintiff-Appellant,

-against- Docket No. 75-7338

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BRIEF FOR DEFENDANTS-APPELLEES SLAWINSKI, THE NEW YORK STATE NARCOTIC ADDICTION CONTROL COMMISSION, AND NEW YORK STATE.

Preliminary Statement

Plaintiff-Appellant ("plaintiff") has appealed from a final order of the United States District Court for the Southern District of New York (Bonsal, D.J.) dated October 15, 1974, dismissing for lack of jurisdiction and failure to state a claim for which relief can be granted, plaintiff's pro se complaint. The decision is unreported and is annexed hereto as Appendix A.

Questions Presented

1. In that the action was commenced more than three years after the purported claim accrued, did the district court correctly rule that the claim was time-barred?

2. In that the sole relief prayed for was an award of $10,000 punitive damages against the State of New York, was the District Court correct in holding that such claim was barred by the Eleventh Amendment?

Statement of the Case

Prior Proceedings

The instant action was commenced on June 24, 1974 by the filing of a pro se complaint in the United States District Court for the Southern District of New York. The complaint's sole prayer for relief was $10,000 in punitive damages against the State of New York, as well as $10,000 punitive damages against the City of New York.

By notice of motion and answer, dated August 5, 1974 and filed August 6, 1974, state defendants-appellees ("defendants") moved pursuant to Rules 12(b)(1), and (6), F.R. Civ. P. to dismiss the complaint, or in the alternative, pursuant to Rule 12(c), for judgment on the pleadings. On August 19, 1974, plaintiff filed a "reply" and on October 15, 1974, the Court (Bonsal, D.J.) granted defendants' motion on the alternative grounds that the State of New York and its agencies are not a "persons" within the meaning of 42 U.S.C. § 1983 and was, in any event, immune from a suit for damages under the Eleventh Amendment. One week later, plaintiff moved, apparently purauant to Rule 60(b), F.R.Civ.P., to "reargue" and for other relief. On January 15, 1975, the District Court (Bonsal, D.J.)

denied the application in all respects, on the additional ground that it was barred by the Statute of Limitations.* This decision is annexed hereto as Appendix B.

Statement of Claims

According to the complaint, insofar as it concerns appellees NACC**, Slawinski, and the State itself the claims are simple. Plaintiff was, until the time of his termination, on March 10, 1971, a probationary Narcotic Correction Officer. On that date Slawinski, who was then the Director of the Sheridan Center where he was employed, terminated plaintiff's employment without a hearing because of his manifest unfitness for the position. Petitioner claims damages because he was terminated on an arbitrary basis and without a hearing, and directly flowing from his improper arrest for unstated charges although he was subsequently convicted of harassment on a plea of guilty.***

* N.Y.C.P.L.R. § 214, subd. 2

** In the complaint, the State agency involved is denominated by its original title: "Narcotic Addiction Control Commission". At the time the complaint was filed, however, by virtue of L. 1973, ch. 676 §§ 3, 32, the name of the agency was the Drug Abuse Control Commission. By L. 1975 c. 676, the name of the agency was again changed; this time to the Office of Drug Abuse Services. For the sake of clarity, the original designation or its acronym (NACC) will be used hereout.

*** McKinneys Penal Law § 240.25. Harassment is a "violation". A "violation", though not a "crime", is an offense for which the maximum imprisonment is 15 days. Penal Law § 10.00 subds. 1,3 and 6 See In re W., 34 A D 2d 1100 (4th Dept., 1970), affd. 28 N Y 2d 589 (1971). No jury trial need be afforded. People v. L.A. Witherill, Inc., 29 N Y 2d 446 (1972); People v. DuPont, 28 A D 2d 1135 (2d Dept. 1967).

On behalf of the state defendants, an answer was filed, denying certain allegations in the complaint and setting forth five affirmative defenses; plaintiff had no property interest in the job and therefore there is no due process violation; the action is barred by operation of the statute of limitations; res judicata and collateral estoppel; sovereign immunity; lack of subject matter jurisdiction; and failure to state a claim for which relief can be granted.

Plaintiff was appointed to the position of Narcotic Correction Officer on November 19, 1970. As is required by law, plaintiff's appointment was conditioned on the successful completion of a 4 to 26 week probationary period, during which time he has no tenure and can be terminated without a hearing. N.Y. Civ. Serv. L. § 75, subd. 1.* Plaintiff's probationary period was duly extended and on March 10, 1971, due to his manifest unfitness for the position, plaintiff's employment was

* The mechanics of the termination procedure for probationary employees are set forth in the regulations of the Civil Service Department, 4 N.Y.C.R.R. § 4.5. The first subdivision provides for, with specified exceptions, a minimum probationary period of 4 weeks and a maximum period of 26 weeks. A probationer becomes permanent at the end of the minimum period unless terminated at that point or the probationary period is extended by the appointing authority. If extended, a probationary employee may be terminated at any time prior to the expiration of the maximum period without a hearing. Matter of Albano v. Kirby, 36 N Y 2d 526 (1975).

terminated by the appointing authority. Parenthetically, subsequent thereto, because of the peculiar budgetary problems for fiscal 1971-1972, all probationers at NACC were terminated effective April 1, 1971.

Subsequent to his termination, plaintiff began a proceeding in New York Supreme Court, challenging his termination as being without a hearing, and unreasonable, arbitrary and capricious (N.Y.C.P.L.R. § 7801, et seq.). In that proceeding plaintiff made the same claims as here made, and the court dismissed the petition on the merits. In the Matter of Canty v. Slawinski, (Sup. Ct. N.Y. County), N.Y.L.J. 8/24/71 p. 2 col. 1. The court (Helman, J.) specifically reached and disposed of the issue on the merits, stating that petitioner, being a probationer could be dismissed without a hearing and that the termination of petitioner's employment was neither arbitrary nor capricious.

Almost three years after the Supreme Court decision, plaintiff, recasting his complaint ever so slightly, has sought to relitigate issues already resolved in the state court.

POINT I

THE DISTRICT COURT CORRECTLY RULED THE CLAIM BARRED BY THE STATUTE OF LIMITATIONS.

It is well settled that where a federal statute creating a cause of action does not by itself contain a time limitation, reference shall be made to the most closely analogous state statute in the forum state.* Johnson v. Railway Express Agency, ____ U.S. ____, 43 U.S.L.W. 4623, 4626-7 (5/19/75); O'Sullivan v. Felix, 233 U.S. 318 (1914); Hoffman v. Halden, 268 F. 2d 280 (9th Cir. 1959); Wilson v. Hinman, 172 F. 2d 914 (10th Cir. 1949), cert. den. 336 U.S. 970 (1949).

This Court has adopted the same view in Swan v. Board of Higher Education, 319 F. 2d 56 (1963) and more recently in Romer v. Leary, 425 F. 2d 186 (2d Cir. 1970). In Swan, a student challenged, on due process grounds, his dismissal from Queens College. The Court, speaking through Judge (now Mr. Justice) Marshall, while granting the legitimacy of the claim, stated that any relief (whether in law or in equity,

* An interesting issue not here relevant is where the forum state's statute differs from the statute of limitations in the state where the cause of action arose or where the transaction is centered, which statute applies.

Hornberg v. Armbrecht, 327 U.S. 392 [1946]; Cope v. Anderson, 331 U.S. 461 [1947]) was barred by the statute of limitations. The court held that the applicable state statute was N.Y.C.P.A. § 48(2) which created a six year statute for causes of action created by statute, for the obvious reason that "plaintiff's cause of action derives from a statute, the Civil Rights Act." The court further held in conformance with state law, that the case of action arose when the plaintiff was suspended and that started the statute running. 319 F. 2d at 60.

In a case even closer to the instant one, Romer v. Leary, supra, the court reached the same conclusion as the Swan court. It held (425 F. 2d at 187):

> "It is now settled. . .that in a suit seeking declaratory and injunctive relief which is based on the Civil Rights Act, 42 U.S.C. § 1983, the applicable limitation in a case arising in New York is the three year limitation now provided for suits 'to recover upon a liability * * *created or imposed by statute' by what is now CPLR § 214, subdivision 2."

The cause of action in the instant case arose when petitioner was terminated on March 10, 1974. The summons in the instant case indicates that the complaint was filed in June of 1974, and not served until July of 1974. By either date of filing (which starts an action in the District Court) or by date

of service (which starts an action for state law purposes)* more than three years has elapsed since the cause of action accrued. Consequently, it is, as the District Court held, time-barred.** See too: Association for the Preservation of Freedom of Choice v. Simon, 299 F. 2d 212, 214 (2d Cir. 1962); Kaiser v. Cahn, 510 F. 2d 282 (2d Cir. 1974).

POINT II

THE ELEVENTH AMENDMENT BAR AN AWARD FOR MONEY DAMAGES FROM THE STATE.

Plaintiff asks as the sole relief in this case punitive damages against the State of New York in the amount of $10,000. The State of New York is a sovereign and can only be sued where it through its legislature, consents to be sued. The state has consented to be sued in the Court of Claims and in no other place. Court of Claims Act § 8. By virtue of this doctrine and by operation of the Eleventh Amendment, the state is immune from a suit for damages in the federal court.

* The statute of limitations is tolled by the interposition of a claim. CPLR § 203.

** Even if one accepts plaintiff's argument that the claim is a constitutional one not arising under 42 U.S.C. § 1983 but some generalized tort claim with federal question jurisdiction under 28 U.S.C. § 1331, the applicable or conceivably applicable statutes would still bar the action, as it is clearly not an action on a bond, money judgment, by the State for real property or by the State's grantee for real property, for which the Statute is twenty years. N.Y.C.P.L.R. § 211; nor is it an action to recover real property or its possession, annulment of letters patent or to redeem from a mortgage for which the period is ten years. N.Y.C.P.L.R. § 212; nor is it any covered by N.Y.C.P.L.R. § 213. Rather, it is covered under N.Y.C.P.L.R. § 214 subds. 4 or 5, for which a two year period is applicable; or under N.Y.C.P.L.R. § 215, subd. 3 or under C.P.L.R. § 217 for which the periods are one year or four months, respectively.

Edelman v. Jordan 416 U.S. 134, (1974); Employees v. Dept. of Public Health & Welfare, 411 U.S. 279 (1973); Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1971); Rothstein v. Wyman, 467 F. 2d 226 (2d Cir. 1972) cert den. 411 U.S. 921 (1973).

Insofar as plaintiff seeks to hold Slawinski liable, it is sufficient to point out that as service has never been made on Slawinski personally, the district court lacked jurisdiction over him and therefore could not render a money judgment against him. Kirkland v. State Department of Correctional Services, 374 F. Supp. 1361, 1381 n. 17 (S.D. N.Y. 1974).

POINT III

ALTERNATIVE GROUNDS, NOT RELIED UPON BY THE COURT BELOW, ALSO SERVE AS A BASIS FOR AFFIRMANCE. THERE WAS NO POSSIBLE BASIS FOR THE DUE PROCESS CHALLENGE.

A.

Plaintiff having no cognizable property interest in his job was not deprived of anything without due process of law.

It is now too well settled to be susceptible of debate that a public employee not granted tenure by either statute, contract, or a demonstrable past practice, has no property interest in the continuation of his position and therefore may be terminated for any reason not constitutionally prohibited

or for no reason at all. As the Supreme Court noted in Board of Regents v. Roth, 408 U.S. 564, 577 (1972):

> "Property interest, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

See also Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); Perry v. Sinderman, 408 U.S. 593 (1972); Arnett v. Kennedy, 415 U.S. 651 (1974).

This Court in Russell v. Hodges, 470 F. 2d 212 (2d Cir. 1972) clearly indicated that damage to his reputation in the community portion of the test only arises in the exceptional cases where reasons are somehow made public. Hence however, nowhere are the reasons for the termination made public and therefore there is no possible basis for claiming a right to a hearing. Russell v. Hodges, supra, 470 F. 2d at 216-17. See also, Ill. State Emp. U., Council 34, AFSCME v. Lewis, 473 F. 2d 561 (7th Cir. 1972); Heaphy v. U.S. Treasury Dept., Bureau of Customs, 354 F. Supp. 396 (S.D.N.Y. 1973), affd. 489 F. 2d 735 (2d Cir. 1974).

Consequently, plaintiff failed to state the claim under 42 U.S.C. § 1983 that he was deprived of liberty without due process of law.

B.

The action is barred by the doctrines of res judicata and collateral estoppel.

The courts have been unanimous in holding that the principles of res judicata and collateral estoppel bar an action under 42 U.S.C. § 1983, where there is a final state court adjudication of the controversy on the merits, such as there is in the instant case.* In Phillips v. Shannon, 445 F. 2d 460 (7th Cir. 1971), the plaintiff having suffered a dismissal of an action in state court, "with prejudice", sought to relitigate the same cause of action in federal court. The court held that where the issues were substantially identical and there was an actual adjudication on the merits, the federal action was res judicata. The language in Johnson v. Department of Water and Power, 450 F. 2d 294, 295 (9th Cir. 1971) is particularly apropos of the instant situation.

* While most courts have decided the cases on res judicata grounds, there is a line of cases that hold that a federal district court is without jurisdiction to redetermine issues decided by the state court, because it would amount to a ursurpation of the Supreme Court's exclusive power to review state court determinations of federal questions. 28 U.S.C. § 1257(3). Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). See also Lecci v. Cahn, 493 F. 2d 826, 829-830 (2d Cir., 1974) Daniel B. Fraizer Co. v. Long Beach Twp., 77 F. 2d 764 (3rd Cir. 1935); Paul v. Dade County, 449 F. 2d 10 (5th ir. 1969) cert den. 397 U.S. 1065 (1970); Mackay v. Nesbitt, 412 F. 2d 846 (9th Cir. 1969), cert den. 396 U.S. 960 (1969).

The court there wrote:

> "Appellant chose to pursue his remedies through the state administrative and judicial system. He neglected to file his remedial action before the Board of Civil Service Commission until the statute of limitations had tolled. Nevertheless, he received a hearing and a rehearing. The subsequent state court adjudication was not based solely on the statute of limitations issue, but proceeded to hold independently that appellant's complaint did not indicate any actions of fraud, deceit or misrepresentation by defendants resulting in his termination. Appellant had every opportunity to present his side of the case in the state courts. He cannot now reinstitute the same cause, against the same defendants, based on the same facts, by merely changing the legal theory and crossing from the state to the federal courthouse [Footnote ommited].

To the same effect see Thistlewaite v. City of New York, 362 F. Supp. 88, 92-94 (S.D.N.Y. 1973), affd. 497 F. 2d 339 (2d Cir. 1974); Tang v. Appellate Division, 487 F. 2d 138, 141 (2d Cir. 1973); Lackawanna Police Benevolent Ass'n, Balen, 446 F. 2d 52 (Cir. 1971); Lombard v. Board of Education, 502 F. 2d 631, 636-637 (2d Cir. 1974); Olson v. Board of Education, 250 F. Supp. 1000 (E.D.N.Y.), appeal dismd. 367 F. 2d 565 (2d Cir. 1964); Taylor v. New York City Transit Authority, 433 F. 2d 665 (2d Cir. 1970); and Howe v. Brouse, 422 F. 2d 347 (8th Cir. 1970). Recently, the Third Circuit also had occasion to deal with the issue. In Roy v. Jones, 484 F. 2d 96 (3rd Cir. 1973), the Governor of Pennsylvania suspended for cause a group of justices of the peace. The

justices then petitioned the Pennsylvania Supreme Court for an order revoking the suspension. The petition was denied. The justices then sought a stay from the Supreme Court which was denied by Mr. Justice Brennan. The plaintiffs never perfected the petition for a writ of certiorari. Instead, they commenced a civil rights action against the Pennsylvania Supreme Court justices, challenging the constitutionality of their action upholding the Governor's decision. Relying on the Court's decision in Angel v. Bullington, 330 U.S. 183 (1947), the Circuit held (484 F. 2d at 98):

> "It is clear from a recitation of the facts of this case that the appellants have sought, through the vehicle of a section 1983 suit for injunctive relief to have a lower federal court engage in what essentially constitutes relitigation of issues already decided by Pennsylvania's highest court. Having failed to pursue the only available course for federal review of a state court's determination -- a writ of certiorari from the Supreme Court of the United States -- the appellants are now barred by the principles or res judicata from obtaining such review in the lower federal courts".

Similarly, the Sixth Circuit in Coogan v. Cincinnati Bar Association, 431 F. 2d 1209 (1970), used the same approach. There it wrote (431 F. 2d at 1211):

> "Coogan had an adequate remedy for review of his suspension by petitioning the Supreme Court of the United States for a writ of certiorari. He chose not to resort to that remedy. The Civil Right Act was not designed to be used as a substitute for the right of appeal, or to collaterally attack a final judgment of the highest court of a state and relitigate the issues which it decided.

> The final judgment of the [State] Supreme Court is conclusive and Coogan is precluded by the doctrine of res judicata from relitigating not only the issues which were actually involved in the disbarment proceeding, but also the issues which he might have presented."

See also, Bricker v. Crane, 468 F. 2d 1228 (1st Cir. 1972); P.I. Enterprises, Inc. v. Cataldo, 457 F. 2d 1012 (1st Cir. 1972); Woolley v. Eastern Air Lines, Inc., 273 F. 2d 615 (5th Cir. 1960).

Perhaps the terse statement of the principle is best. The Ninth Circuit wrote in Scott v. California Supreme Court, 426 F. 2d 300, 301 (9th Cir. 1970):

> "Scott may or may not have had a good case in the California state courts in connection with his wife's estate. Even good cases can be lost. California had jurisdiction and he lost his case there. The issues have all been decided against him there. It is a clear situation of res judicata."

So it is here. The State Court had jurisdiction and petitioner lost his case. The issues, whatever their merit, must have necessarily been decided against him there. It is clear situation of res judicata.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD, IN ALL RESPECTS BE AFFIRMED.

Dated: New York, New York
August , 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Appellees

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

STANLEY L. KANTOR
Assistant Attorney General
of Counsel

APPENDIX A

Memo-Decision
ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LESLIE CANTY, JR.,

Plaintiff,

-against-

ELMER FLEMING, NEW YORK CITY POLICE DEPARTMENT, NARCOTIC ADDICTION CONTROL COMMISSION, STANLEY A. SLAWINSKI, Director, and the STATE OF NEW YORK,

Defendants.

#41311

PRO SE
74 Civ. 2696

MEMORANDUM

BONSAL, D. J.

On June 24, 1974, plaintiff, Leslie Canty, Jr., a former New York State probationary Narcotic Correction Officer, filed a pro se complaint under the Civil Rights Act of 1964 (42 U.S.C. §1983) naming as defendants the New York City Police Department, Elmer W. Fleming, a detective of the police department, the New York State Narcotic Addiction Control Commission, and Stanley A. Slawinski, Director of the Narcotic Addiction Control Commission. Plaintiff seeks $10,000 in punitive damages from the State of New York and $10,000 in punitive damages from the New York City Police Department, alleging that he was unlawfully discharged from his

employment. Service of the complaint has been made only on the New York City Police Department and the New York State Drug Abuse Control Commission.* The Attorney General of New York filed an answer and moves to dismiss the complaint or for judgment on the pleadings.

It appears that on November 19, 1970, plaintiff was appointed a probationary Narcotic Correction Officer of what was then known as the Narcotic Addiction Control Commission. See N.Y. Civ. Serv.Law §75 (McKinney 1973); 4 N.Y.C.R.R. §4.5. During his probationary period, plaintiff was arrested by Detective Fleming on charges which plaintiff claims were unwarranted and made in bad faith. Prior to any action by the District Attorney's Office, Detective Fleming, according to the plaintiff, informed plaintiff's superior, Slawinski, of the pending charges. On March 10, 1971, Slawinski notified the plaintiff in writing that he was being discharged from his position because plaintiff's arrest rendered him unfit, in Slawinski's opinion; that conferences with plaintiff's supervisors had reinforced his opinion; and that, in any event,

* As a result of the 1973 amendments to the New York Mental Hygiene Law, which expanded the jurisdiction of the Narcotic Addiction Control Commission to include non-narcotic drugs, the agency's name was changed to the Drug Abuse Control Commission. N.Y. Laws [1973] ch. 676, §§ 3, 32 (eff. Sept. 1, 1973), amending N.Y. Mental Hygiene Law §203 (McKinney 1971), recodified at N.Y. Mental Hygiene Law §81.07 (McKinney Supp. 1973).

plaintiff's employment would terminate as of April 1, 1971 since all probationary employees were being terminated on that date for budgetary reasons.

The District Attorney's Office did not prosecute the charges filed by Detective Fleming and charged him only with "harassment," to which the plaintiff pled guilty.

Plaintiff contends that his dismissal constituted arbitrary and capricious action and that he was deprived of due process by both Detective Fleming and Mr. Slawinski.

In his motion to dismiss, the Attorney General contends that the plaintiff was not deprived of due process because he had no "cognizable property interest" in his job as a probationary employee and the State had complied with the requirements of the civil service laws, and contends that plaintiff's action in any event is barred by the State's three-year statute of limitations and by the Eleventh Amendment to the United States Constitution.

The Court grants the Attorney General's motion to dismiss since the Court of Appeals for this Circuit has held that this Court is without jurisdiction to award damages against the State of New York, which is not a "person" within the meaning of 42 U.S.C. §1983. Zuckerman v. Appellate Division, Second Department, Supreme Court of the State of New York, 421 F.2d 625, 626 (2d Cir. 1970); Rosado v. Wyman, 414 F.2d 170, 178 (2d Cir. 1969), rev'd on other

grounds, 397 U.S. 397 (1970); Johnson v. Rockefeller, 58 F.R.D. 42, 46 (S.D.N.Y. 1972). See Moor v. County of Alameda, 411 U.S. 693 (1973); Monroe v. Pape, 365 U.S. 167 (1961); Sams v. New York State Board of Parole, 352 F.Supp. 296 (S.D.N.Y. 1972). Moreover, plaintiff's action must be dismissed because the State has not consented to suits for damages unless the actions are brought in the New York Court of Claims and, under the Eleventh Amendment, absent such consent, this Court lacks jurisdiction to award damages against the State. Edelman, Director of Illinois Department of Public Aid v. Jordan, ____U.S.____, 42 U.S.L.W. 4419 (U.S. Mar. 25, 1974), and cases collected therein; Employees v. Department of Public Health and Welfare of Missouri, 411 U.S. 279 (1973); Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), cert. denied, 411 U.S. 921 (1973).

Accordingly, the complaint is dismissed as to the defendant the State of New York, and for the same reasons, the complaint is dismissed as to the City of New York Police Department, the only other defendant which has been served.

It is so ordered.

Dated: New York, N.Y.
October 15, 1974.

U. S. D. J.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

LESLIE CANTY, JR.,

Plaintiff,

-against-

ELMER FLEMING, NEW YORK CITY POLICE DEPARTMENT, NARCOTIC ADDICTION CONTROL COMMISSION, STANLEY A. SLAWINSKI, Director, and the STATE OF NEW YORK,

Defendants.

- x

PRO SE
74 Civ. 2696

#-41941

MEMORANDUM

BONSAL, D. J.

Plaintiff pro se, Leslie Canty, Jr., moves for reargument of this Court's Order of October 15, 1974, dismissing the complaint as to the State and City of New York; for service of summonses on the remaining named defendants, Elmer Fleming and Stanley A. Slawinski; and for a review of other actions of the New York City Police Department and the New York State Narcotic Addiction Control Commission.

After considering plaintiff's contentions and affidavits, the Court denies plaintiff's motion and adheres to its previous Order dismissing plaintiff's claims against the State and City of

New York.

The Court also denies plaintiff's application for the issuance of summonses against Elmer Fleming and Stanley A. Slawinski. This Court has no subject matter jurisdiction since plaintiff's claims, asserted under the Civil Rights Act of 1964, 42 U.S.C. §1983, against each of these individuals, are time-barred by the applicable statute of limitations, N.Y.C.P.L.R. 214(2), which provides a three-year period within which to commence suits "to recover upon a liability ... created or imposed by statute." Romer v. Leary, 425 F.2d 186 (2d Cir. 1970). See Ortiz v. LaVallee, 442 F.2d 912 (2d Cir. 1971). Plaintiff's cause of action arose when he was discharged on March 10, 1971, but he did not file his complaint in this Court and thereby toll the statute of limitations (Romer v. Keyes, 162 F.2d 136 (2d Cir. 1947) (Hand, J.); see Smith v. Peters, 482 F.2d 799, 803-04 (6th Cir. 1973)) until June 24, 1974, more than three years later.

Accordingly, plaintiff's applications are denied in all respects.

It is so ordered.

Dated: New York, N.Y.
January 15, 1975.

U. S. D. J.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Reaver Walker , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellees herein. On the 29 day of August , 1975 , she served the annexed upon the following named person :

Leslie Canty, Jr.
301 West 150th Street
New York, N.Y. 10039

Appellant
~~Attorney~~ in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Plaintiff ~~Attorney~~ at the address within the State designated by him for that purpose.

Reaver Walker

Sworn to before me this
29th day of August , 1975

Assistant Attorney General
of the State of New York